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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1226.

CHESAPEAKE AND CURTIS BAY RAILROAD COMPANY AND WESTERN MARYLAND RAILWAY COMPANY,

Petitioners,

vs.

RICHFIELD OIL CORPORATION OF NEW YORK.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

BRIEF BY THE RESPONDENT IN OPPOSITION.

J. COOKMAN BOYD, JR.,
FELIX C. LOURIE,
J. COOKMAN BOYD, SR.,
Counsel for Respondent.

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OPINION BELOW.

The opinion of the Court of Appeals of Maryland in the first appeal (R. 243) is recorded in 179 Md. 560 (advance sheets) and in 20 Atl. (2d) 581; and the opinion in the second appeal (R. 272) is not yet officially reported but is unofficially reported in 23 Atl. (2d) 677.

JURISDICTION.

The opinion of the Court of Appeals of Maryland (R. 243) was entered on June 10, 1941. The Motion for Reargument by Petitioners was filed on July 9, 1941, and was overruled on July 11, 1941; and the mandate following said decision was filed July 12, 1941. The opinion of the Court of Appeals in the second appeal was filed January 13, 1942, and the mandate was filed February 9, 1942. No petition for writ of certiorari from said decisions of the Court of Appeals was filed, however, until May 8, 1942. Petitioners seek to invoke the jurisdiction of this court under Section 237(b) of the Judicial Code [28 U. S. C. A., §344(b)].

STATEMENT OF THE CASE.

The Richfield Oil Corporation of New York is a corporation engaged in the purchase, sale, refining, manufacture, storage, and distribution of oil and its products. It owns a large tract of land in fee bordering on Curtis Bay, in an outlying section of Baltimore City, Maryland, upon which is located its plant consisting of buildings, stills, tanks, etc., and pipe lines running throughout said tract, necessary for the purpose of carrying its products to and from its tanks and stills, connecting each with the other, and also connecting with the pier and loading racks used in shipping its products to and from said plant.

Running across said tract is a plant railroad, originally erected by the United States Asphalt Refining Company, predecessor in title to this Respondent, for the sole purpose of transporting its products to, from, and between its plant facilities. Later this railroad was incorporated as the Chesapeake and Curtis Bay Railroad Company by the owners of The United States Asphalt Refining Company.

An easement of right of way for railroad purposes, reserving to itself, however, certain rights of joint use thereof, was granted by the Asphalt Company to the Chesapeake and Curtis Bay Railroad Company by three deeds, one dated March 16, 1916, one dated January 2, 1924, and one dated September 11, 1925, which last was called an exchange deed and was merely a mutual deed between the two companies for the purpose of straightening out slight discrepancies as to small portions of said rights of way, all of which deeds are set forth R. 34, 36, 11.

Shortly thereafter the stock of the Chesapeake and Curtis Bay Railroad Company was purchased by the Western Maryland Railway Company, which Company has since operated and managed the Chesapeake and Curtis Bay Railroad.

Reference to Plats (R. 10A, 34A, 36A) will show that the railroad rights of way were so laid out from the very beginning, by the original owner of the land and the railroad, so that if the same were granted in fee simple to a third party, the same would divide the property into approximately twelve separate, distinct parcels of land, each, for all practical purposes, inaccessible from the others. However, pipe lines for carrying oil, necessary and proper to the operation of the plant, were laid under the railroad rights of way at various places, from time to time, since the inception of the railroad continuously to the time of the trouble complained of in this cause in 1940, under claim of right, without asking or receiving permission from, and with full knowledge of, the railroad companies, the Petitioners herein.

The Richfield Oil Corporation, in pursuance of a general plan for developing its property into a modern and well-equipped terminal, on the evening of November 2, 1940,

and at a time which was calculated not to, nor which in any way did, interfere with or interrupt the reasonable and proper use by the Railroad Companies of said rights of way for railroad purposes, or unreasonably interfere with the operation or maintenance of said railroad tracks and rights of way, or the operation of cars over the right of way, and and with due regard to the safe, proper, and convenient operation of the railroad, placed certain sleeves and pipes necessary for the transportation of its petroleum products from one part of its property and continuing through the same under the tracks and said rights of way of the Railroad Companies; and said pipes were laid in a workmanlike manner and in conformity with other pipe lines theretofore previously, and continuously, laid under said rights of way. On the next day the Railroad Companies trespassed on the property of the Richfield Oil Corporation and attempted to remove said pipes and sleeves from under the tracks and rights of way of the Railroad Companies, and did succeed in partially cutting, burning, mutilating, and partially destroying the aforesaid sleeves and pipes belonging to the Richfield Oil Corporation.

Thereupon and thereafter the Richfield Oil Corporation filed its Bill of Complaint in the Circuit Court No. 2 of Baltimore City against the Chesapeake and Curtis Bay Railroad Company and the Western Maryland Railway Company, in which it was prayed "that the Defendants, they and each of them, their agents and servants, be permanently enjoined and strictly prohibited from interfering, obstructing, or molesting the Complainant, its agents and servants, in crossing or recrossing over, or in placing its pipe lines, connections, or other equipment necessary and proper to the operation and enjoyment of Complainant's property hereinabove described, across and under the right of way of Defendants located on the Complainant's said

property, provided, however, that the same be performed by the Complainant in such manner as not to interfere with or interrupt the reasonable and proper use by the Defendants of said right of way for railroad purposes."

Thereafter the Circuit Court No. 2 of Baltimore City, upon hearing, refused to grant the injunction prayed and dismissed the Bill of Complaint. From this action of the Court an appeal was taken to the Court of Appeals of Maryland by Richfield Oil Corporation, respondent here, and, after due and final hearing, the Court of Appeals of Maryland reversed the action of the lower Court and filed its opinion, wherein it stated that the primary question to be decided is whether the appellees, Chesapeake and Curtis Bay Railroad Company and Western Maryland Railway company own the fee of the land underlying its railroad tracks. The Appellate Court found that the fee was in respondent here, Richfield Oil Corporation of New York, and that an easement of rights of way for railroad purposes is in the Petitioner, Chesapeake and Curtis Bay Railroad Company. It further found that "the Richfield Oil Corporation of New York had the right of crossing or recrossing over, or in placing its pipe lines or other equipment necessary and proper to the operation and enjoyment of its property across and under the right of way of the Chesapeake and Curtis Bay Railroad Company located on the property owned by the Richfield Oil Corporation in fee, *"provided, however, that this be performed by the Appellant in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the Appellee of said rights of way for railroad purposes."* (Italics added.) The Court said:

> "For the reasons herein given we find that the injunction should have been granted as prayed." (R. 255)

The decree of the Circuit Court No. 2 of Baltimore City was thereupon reversed, with costs, and the case was remanded for the passage of a decree in accordance with the views expressed in said opinion. The case was remanded to the lower Court for the *sole* purpose of entering a decree in accordance with the views expressed by the Court of Appeals of Maryland, and on July 15, 1941, a decree was signed by the Circuit Court No. 2 of Baltimore strictly in accordance with the mandate of the Court of Appeals of Maryland. From that decree another appeal was taken to the Court of Appeals of Maryland, and on the 13th day of January, 1942, in deciding this second appeal, the Court of Appeals of Maryland affirmed the action of the lower Court in entering this decree, as being in strict conformity with the first opinion and mandate.

ARGUMENT.

I.

THE FEDERAL QUESTIONS SET FORTH IN THE PETITION FOR CERTIORARI WERE NOT DULY RAISED.

The Certificate of Chief Judge dated April 1, 1942 (R. 276) is erroneous and not in accord with the facts and record. This Certificate was prepared by counsel for Petitioners, was presented for signature, and was included in this Record ex parte, without notice before or after to counsel for respondent—certainly not a practice to be commended. Upon motion of Respondent, the same has been modified by Stipulation and Certificate of Chief Judge dated May 11, 1942, wherein it will appear by said modified Certificate (R. 278) that "the Federal questions set forth in the Certificate of the Chief Judge dated April 1, 1942 (R. 276) were not raised or urged by the Appellants in the first appeal and the same were not considered by this Court in its deliberations leading up to and resulting in the opinion of this Court dated June 10, 1941."

The Certificate of Chief Judge dated April 1, 1942, insofar as the same applies to the second appeal should be carefully considered in connection with the actual record.

Powell vs. Brunswick County, 150 U. S. 433

The Chief Judge who signed the same did not hear the case argued on the second appeal (R. 272); and in the opinion in that appeal it was said:

> "The Constitution of Maryland, Art. 4, Sec. 15, provides that the judgments of the Court of Appeals shall be final and conclusive. Therefore, the decision of this Court in any cause is binding upon the lower Court and cannot be disregarded. Likewise, any decree which conforms with the opinion and mandate of the Court of Appeals is binding in subsequent proceedings in the same cause. No litigant can be allowed to prosecute different and successive appeals on the same state of the record, except in case of new proceedings since the last appeal and then only in respect to questions raised by the new proceedings."

thus reaffirming a long line of Maryland cases to the effect that the Court will not consider on second appeal questions not previously raised on the record, or properly arising out of actual new proceedings, of which there were, and could have been, none in this case.

The Respondent herein respectfully, but emphatically, contends that the decision of the Court of Appeals of Maryland dated June 10, 1941, was a final decision upon all questions involved in the case. That decision finally decided (1) that the Richfield Oil Corporation owned the fee (R. 254), (2) that Chesapeake and Curtis Bay Railroad Company owned only an easement in the right of way for railroad purposes (R. 254), (3) that "the appellant (Richfield Oil Corporation), its agents and servants have the right of crossing or re-crossing over, or in placing its pipe

lines, connections or other equipment necessary and proper to the operation and enjoyment of appellant's property across and under the right of way of appellees located on the property owned by the appellant in fee provided, however, that this be performed by the appellant in such manner and at such times as not to interfere with or interrupt the reasonable and proper use by the appellees of said rights of way for railroad purposes." (R. 255), and (4) that the injunction should have been granted as prayed (R. 255).

The above was the final decision on the merits of all questions involved in the case.

In the case of *Rio Grande Western R. Co. vs. Stringham*, 239 U. S. at 47, the Court says:

> "Manifestly the first judgment was final within the meaning of the Jud. Code, §344. It disposed of the whole case on the merits, directed what judgment should be entered, and left nothing to the judicial discretion of the trial court."

It would appear that the *Stringham* case was approved in *First Bank Stock Corporation vs. Minnesota*, 300 U. S. 635, wherein it is stated:

> "The appeal herein is dismissed upon the authority of Rio Grande Western Ry. Co. vs. Stringham, 239 U. S. 44, 47."

In the modified Certificate of Chief Judge it appears, and it is indeed conceded, that no federal question of any kind whatsoever was raised or urged, considered, or decided in the first appeal. This fact is also true of the pleadings, evidence, and briefs of counsel.

In the first appeal the opinion of the Court of Appeals of Maryland was filed June 10, 1941. Thereafter, but

before the mandate was sent down, a Petition and Motion for Reargument by the Chesapeake and Curtis Bay Railroad Company and Western Maryland Railway Company, wherein said Petitioners simply reiterated their former argument, was filed and overruled. In Petitioners Motion for Reargument, not one word attempting to raise a federal question appears. This motion is covered by the modified certificate of Chief Judge dated May 11, 1942 (R. 278). Since the same was not included as part of the transcript of record in this case, copy thereof is filed as Appendix "A" to this Brief in opposition. On the 12th day of July, 1941, the case was remanded to the lower Court for the purpose, *and only for the purpose,* of having the lower Court enter a decree in accordance with the decision of the Court of Appeals of Maryland (R. 256). It had been decided that the fee was in Respondent; that the Chesapeake and Curtis Bay Railroad Company had an easement in the right of way for railroad purposes; and that the Respondent was entitled to the injunction as prayed. There was no exercise of discretion left to the lower Court. It was only a ministerial body for the sole purpose of carrying out the order of the Court of Appeals as explicitly directed in the first appeal.

On the 22nd of July 1941, before the Circuit Court No. 2 of Baltimore City, when the decree which had been previously signed was presented for filing, counsel for Petitioners, Mr. Parke, in discussing the terms of the decree stated as follows:

> "and the decree follows accurately what the Court of Appeals did say in the opinion verbatim—" (R. 264).

It was upon this occasion, on the 22nd day of July, 1941, and *for the first time since the inception of the litigation,* that there was any suggestion or intimation that any fed-

eral question, whether constitutional, statutory, or of interstate commerce, was sought to be involved.

The original bill of complaint was simple, and based on the claimed title to the land in question plainly prayed for an injunction expressly set out therein (R. 6). Consequently, Petitioners from the outset were confronted with full knowledge of the ultimate relief which might be granted under the bill, and which actually was directed to be granted by the decision in the first appeal. If Petitioners felt they had any federal rights which could have been affected by the relief prayed, they were bound to anticipate such situation, set up their rights in defense of the suit and urge the same in due time and fashion.

Petitioners did none of these things. Their answer (R. 19) to the bill is silent as to any federal question, as is the opinion of the trial court (R. 228); likewise Petitioners' brief in the first appeal to the Court of Appeals of Maryland.

East Tennessee V. & G. R. Co. vs. Frazier, 139 U. S. 288
Hurlbert vs. Chicago, 202 U. S. 275
Cox vs. Texas, 202 U. S. 446.

The decision of that Court fully and explicitly informed Petitioners that the relief as prayed by the bill was granted Respondent. Even had Petitioners in their motion for reargument attempted to raise a federal question it would not have been timely, because said decision could not be regarded as unanticipated.

Herndon vs. Georgia, 295 U. S. 441
Missouri ex rel Missouri Insurance Co. vs. Gehner, 281 U. S. 313, 320
Citizens National Bank vs. Durr, 257 U. S. 99.

Therefore, when the decree was presented to the trial court, admitted by Petitioners' counsel to follow the decision of the Court of Appeals "verbatim" it was too late to attempt to conjure into the situation federal questions never before mentioned.

II.

NO CONSTITUTIONAL RIGHTS OF THE PETITIONERS WERE IN ANY WAY AFFECTED OR VIOLATED BY THE DECISIONS OF THE COURT OF APPEALS OF MARYLAND.

It would unduly prolong this brief in opposition were Respondent to reargue the case from its inception, as has been attempted by Petitioners in their brief. The opinion of the Court of Appeals of Maryland in the first appeal (R. 243)-(R. 256) so fully and clearly sets forth both facts and authorities as to preclude the necessity thereof, and this Respondent relies on and expressly refers thereto.

There are, however, several noteworthy matters to which proper attention has not been paid in Petitioners' brief and petition. The railroad in question transversing the property of the Respondent was originally constructed back in 1912 and thereafter, by the then owner of the property, The United States Asphalt Refining Company, as a plant railroad, dead-ending as to one of its terminii on the waters of Curtis Bay, binding on the instant property, for its own convenience in operating an oil refining and storage plant; and in 1916 was incorporated by the owners of the property as the Chesapeake and Curtis Bay Railroad Company, one of the Petitioners. The record shows, moreover, (R. 134) that Petitioner, Western Maryland Railway Company, was in every way familiar with the inception, and construction of the railroad both before and after its incorporation; and, in fact, said Petitioner made most of the installations of railroad equipment on the various rights of way.

Consequently, both Petitioners were fully aware of the purpose for which the railroad was originally created and of the manner in which that purpose was carried out, to wit, the placing of pipe lines under and above and across the various rights of way, whenever and wherever the same were necessary for the operation of the oil refinery and terminal, consistent with reasonable and safe use of said rights of way for railroad purposes, and various crossings for pedestrian or vehicular purposes where the same were likewise necessary and proper.

Petitioner, Western Maryland Railway Company, prior to its purchase of the stock of the Chesapeake and Curtis Bay Railroad Company was familiar with the title situation as indicated by the deeds of March 16, 1916, January 2, 1924, and September 11, 1925, in all three of which the grant is of, and only of, "the right of way for railroad purposes." (R. 34, 36, 13). The Chesapeake and Curtis Bay Railroad Company was, likewise, thoroughly familiar with the fact that the Court of Appeals of Maryland, in the case of *Texas Company vs. United States Asphalt Refining Co.*, 140 Md. 350, 357, 358, in which case said Petitioner *was a party defendant*, had interpreted the deed of March 16, 1916, and had said:

> "The deed to the railroad company did not convey to it the fee in any part of the land in connection with which the pre-existing easement has been used." (R. 246)

However, Western Maryland Railway Company did not, prior to the time of the consummation of its purchase of the stock of Chesapeake and Curtis Bay Railroad Company, rely on its own interpretation of the records or facts in connection with said railroad, but took the further precaution of applying to and receiving from a recognized title com-

pany, The Title Guarantee & Trust Company in Baltimore, a search and guarantee of the title to and the exact nature of the estate held by the Chesapeake and Curtis Bay Railroad Company, and was advised that the same was but a right of way (R. 202). The Court of Appeals of Maryland held this evidence clearly admissable to show "the understanding which the Western Maryland Railway Company had as to the title at the time of the purchase of the stock." (R. 251)

The conclusion is inevitable that the decision of the Court of Appeals as to the status of the title to this property came as no surprise to the Petitioners. Petitioners were fully aware of the fact that pipe lines under and surface crossings for vehicles and pedestrians, when and where the same had been necessary to the proper operation and use of the oil plant transversed by these railroad tracks and consistent with the safe and proper operation of railroad equipment over the same, had been installed from time to time and used constantly for more than twenty-five years without complaint or objection on the part of Petitioners and without danger to or the slightest interference with the proper and safe operation of the railroad.

Any construction to the contrary would be absurd, as was so pertinently stated by the Court of Appeals of Maryland in its decision on the first appeal (R. 252)

> "The railroad tracks had been laid by the United States Asphalt Refining Company for its own use in transportation of its products. At the time of the incorporation of The Chesapeake & Curtis Bay Railroad Company, both companies were owned by the same interests. It is hardly conceivable that the interests which controlled the parent corporation would create and cause to be conveyed to another corporation a strip of land in fee running through its property, for

by so doing the control and ownership of the newly created corporation might pass to entirely different interests, whereby the parent company might be cut off and not allowed to cross from one part of its property to another, and particularly with tanks and stills on all parts of its property such crossings were necessary for the proper operation of its business."

Replying to the contention in Petitioners' brief, page 48, that the instant decision and decree of the Court of Appeals of the State of Maryland for the first time holds that a right of way for railroad purpose is not an exclusive right of way, and, therefore, impairs the rights granted and conveyed by said deeds, this Respondent says the Maryland Court of Appeals has been consistent in its rulings upon the question of rights of way. In *Bosley vs. Susquehanna Canal*, 3 Bland 63, *decided in 1830*, the Maryland Court of Appeals said at p. 67:

> "A right of way, whether public or private, is essentially different from a fee simple right to the land itself over which the way passes. A right of way is nothing more than a special and limited right of use; and every other right or benefit derivable from the land, not essentially injurious to, or incompatible with the peculiar use called the right of way, belongs as absolutely and entirely to the holder of the fee simple as if no such right of way existed. He is, in fact, for every purpose considered as the absolute owner of the land, subject only to an easement or servitude; he may recover the land so charged by ejectment; he may bring an action of trespass against any one who does any injury to it, not properly incident to an exercise of the right of way; he has a right to the trees growing upon it; to all minerals under its surface; *he may carry water in pipes under it;* and the freehold with all its profits, not inconsistent with the right of way, belong to him." (Italics supplied.)

This case was quoted with approval by the Maryland Court of Appeals in *Pub. Serv. Comm. vs. Gas Etc. Corp.*, 162 Md. at 312, decided in 1932. The same principles were affirmed in the present case.

In *Great Northern Ry. Co. vs. United States,* No. 149 October Term, 1941, 62 S. Ct. 529, this Court construed the General Railroad Right-of-Way Act to grant only an easement, and said at p. 533, "* * * a railroad may be operated though its right of way be but an easement."

III.

THERE HAS BEEN, AND CAN BE, NO INTERFERENCE WITH INTERSTATE COMMERCE.

Likewise, without merit or foundation is the claim in Petitioners brief, pages 54-55, that the doctrine announced by the Court of Appeals of Maryland in the instant case will result in interstate commerce being retarded, burdened and prejudicially affected, especially when the character of the Petitioners railroad is considered, constituting as it does little more than terminal plant facilities, and which obviously has been operated without interference with interstate commerce, despite the continuing existence and operation for so long a time of equipment identical with the pipe lines out of which the controversy arose.

The inconsistency of Petitioners' present claims is aptly shown by comparing the same with Petitioners' position at the trial below, when counsel for Petitioners admitted that there had been and would be no interference with interstate commerce by reason of pipe or other crossings, when they said:

> "Mr. Williams: The Railway Company has never denied access to those parcels and would not expect to deny access to them * * * (R. 56)
>
> * * * * * *

Mr. Williams: * * * If they have the fee then, perhaps, there would be occasion to ask this Court for an injunction.

The Court: If they have the fee?

Mr. Williams: If they have the fee. So as not to confuse these other parcels, if they own the fee here where they laid the pipes and we undertook to prevent them, I suppose they are entitled to relief * * *" (R. 57).

The attempted additions by the Petitioners in their brief filed in this Court of the words "on" and "upon * * * the surface" of Petitioners' right of way, to the language of the Court of Appeals' decision in describing Respondent's right of crossing, although said words "on" and "upon * * * the surface" nowhere appear therein, constitute repetitious and unwarranted interpolations. They appear so frequently in Petitioners' brief as almost to remove their use from the category of chance or understandable error.

Reference need only be made, however, to the injunction as prayed and granted to perceive that there can be no interference with the proper operation of the railroad, either its commerce inter or intra-state, as the injunction provides that such crossings as may be made by Respondent must be made in such manner and at such times as not to interfere with the reasonable and proper use by Petitioners of the rights of way for railroad purposes.

CONCLUSION.

Respondent submits that the decision of the Court of Appeals of Maryland in the first appeal and on the Motion for Reargument thereon finally disposed of all the questions which could be properly raised on the merits of this case, and that the action of Petitioners in seeking to raise the federal questions on which their petition is based for

the first time at the time of the filing of the decree on July 22, 1941, and the appeal therefrom, was obviously an afterthought and constitutes no more than a thinly veiled and disingenious attempt to have considered and reversed questions of law and fact which had been fully and finally disposed of and rightly decided.

Respondent submits that the writ should be denied because

I. No federal questions were raised in due or timely manner before the Court of Appeals of the State of Maryland; and the petition for the writ should have been filed, if at all, within the prescribed time following the first appeal and decision therein;

II. No constitutional or property rights of Petitioners have in any way been violated or affected by the decisions of the Court of Appeals of Maryland in this case; and

III. The subject matter of this litigation does not raise any real or substantial federal questions but only questions uniformly decided against the contentions of Petitioners.

Respectfully,

J. COOKMAN BOYD, JR.,

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J. COOKMAN BOYD, SR.,

Counsel for Respondent.